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No. 07-334

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In The

Supreme Court of the United States

ADAM STEELE; DONNIS SOLBERG d/b/a THE OTHER PLACE; TURTLE CREEK SALOON, INC.; and JAMES NESS d/b/a HILLCREST SUPPER CLUB,

Petitioners,

v.

BELTRAMI COUNTY and SHERIFF KEITH WINGER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit correctly affirmed the District Court's grant of summary judgment on Petitioners' claims because there is no constitutional right to smoke at any time in any place?
2. Whether the Eighth Circuit correctly upheld the Beltrami County Smoke Free Ordinance for Indoor Public Places and Places of Work as a reasonable protection of public health and safety?
3. Whether the dismissal of the claims of Petitioners Solberg and Ness were properly affirmed by the Eighth Circuit?
4. Whether Petitioners' claims have been rendered moot by the enactment of the Minnesota Freedom to Breathe Act of 2007?

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CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution, United States Code Title 42, Sections 1981, 1983, and 1988, and the Beltrami County Smoke Free Ordinance for Indoor Public Places and Places of Work. *See* Pet. at 8.[1]

STATEMENT OF THE CASE AND THE FACTS

After approximately a year and a half of study and debate, Beltrami County passed the Smoke-Free Ordinance for Indoor Public Places and Places of Work ("Ordinance") on August 17, 2004. Pets.' App., pp. 25-33. As clearly stated in the Ordinance, the County found that the detrimental health effects of tobacco smoke were well documented, citing a number of medical and scientific authorities. *Id.* The County further found that eliminating public smoking has no material economic impact on a community, as shown from studies conducted in states where smoking bans have been adopted. *Id.* The stated purpose of the Ordinance is to protect public health and welfare. *Id.*, pp. 25-27.

[1] Citations in the form "Pet." are to Petitioners' Petition. Citations in the form "Pets.' App." are to the Appendix to the Petition.

The Ordinance provides that "smoking is prohibited in public places and places of work." *Id.*, p. 29. "Public places" and "place of work" are defined phrases. *Id.*, p. 28. A public place is defined to include all restaurants and bars. *Id.* The Ordinance specifically excludes all private residences, motor vehicles and outdoor spaces. *Id.*, p. 29. The smoking prohibition for bars and restaurants was phased in over time. Instead of starting on January 1, 2005, which is the effective date of the Ordinance, for the most part, the smoking ban for bars and restaurants did not begin until two years later, on January 1, 2007. *Id.*, pp. 30, 33. Thus, during the peak customer hours of 8:00 p.m. until 3:00 a.m., bars and restaurants were able to continue to allow smoking for an additional two years. Furthermore, the Ordinance allowed bars and restaurants to have smoking areas as long as they were separate, enclosed and separately ventilated from the rest of the bar or restaurant. *Id.*, p. 30.

Adam Steele, Donnis Solberg d/b/a The Other Place, Turtle Creek Saloon, Inc., and James Ness d/b/a Hillcrest Supper Club (hereinafter collectively referred to as "Petitioners")[2] initiated this action against Beltrami County and Sheriff Keith Winger (hereinafter collectively referred to as "Respondents") alleging that their constitutional rights were violated by the enactment of the County's Ordinance. Specifically, Petitioners claimed violations of their constitutional

[2] Original Plaintiffs Corner Bar of Bemidji, Inc. and Tobacco Super Store, Inc. do not join in this Petition.

rights under the Fourth, Fifth, and Ninth Amendments to the United States Constitution.

Although the Ordinance was adopted on August 17, 2004, Petitioners initiated this action by seeking a temporary restraining order just days before the Ordinance took effect on January 1, 2005. When the temporary restraining order was denied by the United States District Court for the District of Minnesota, Petitioners sought a preliminary injunction, which was also denied at hearing on March 7, 2005. Respondents then moved the District Court for summary judgment, which was granted on counts 1-4 and 7 at hearing on June 27, 2005. The remaining state law claims were dismissed without prejudice. Petitioners then appealed to the Court of Appeals for the Eighth Circuit with respect to counts 1, 4, and 7. The Eighth Circuit affirmed the District Court's grant of summary judgment in favor of the Respondents on June 7, 2007.

The record evidence shows that no material issues of fact exist, and that the District Court correctly granted summary judgment in favor of Respondents. The Petitioners' entire argument revolves around the misguided notion that the Constitution somehow guarantees the right to smoke in a bar or restaurant. The proposition that there is a constitutional right to smoke in public places is simply not supported in law and should not be adopted by this Court.

REASONS FOR DENYING THE PETITION

The Eighth Circuit's decision upholding the validity of Beltrami County's Smoke-Free Ordinance for Indoor Public Places and Places of Work does not conflict with a decision of this Court nor any Court of Appeals. To the contrary, the Eighth Circuit's decision is consistent with the decisions of all other courts that have addressed similar claims. There is simply no authority supporting Petitioners' claimed constitutional right to smoke or to control smoking on premises they have opened to the public. Accordingly, Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10. Moreover, Petitioners' claims are rendered moot by the enactment of the Minnesota Freedom to Breathe Act of 2007, which took effect on October 1, 2007 and imposes statewide smoking restrictions similar to the restrictions of the Beltrami County Ordinance.

1. THE EIGHTH CIRCUIT CORRECTLY HELD THAT THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE AT ANY TIME IN ANY PLACE.

Despite Petitioners' assertion that their claims are not an attempt to create any rights not already enumerated in the United States Constitution, accepting Petitioners' claims would require the Court to recognize a new constitutional right to smoke. Petitioners broadly allege that the Beltrami County Ordinance violates their constitutional right to privacy, as

guaranteed by the Fourth, Fifth, and Ninth Amendments. Specifically, Petitioners allege that their right to smoke, and to permit smoking, in any place at any time, stems from alleged existing rights to privacy within one's private business, the right of a business owner to regulate lawful conduct, the right of a business owner to contract with customers, and the right of a business owner to not have goodwill diminished by government regulation. Pet., at 13. Because Petitioners can point to no law supporting such assertions, the District Court and Eighth Circuit properly found that the Respondents were entitled to judgment as a matter of law.

The Eighth Circuit held that Petitioners failed to provide any sound legal argument or authorities supporting their claimed constitutional rights to smoke or to control smoking on premises they have opened to the public. *See* Pets.' App., p. 19. In fact, several state and municipal smoking regulations have survived similar challenges. *See, e.g., D.A.B.E. Inc. v. City of Toledo*, 393 F.3d 692, 696 (6th Cir. 2005); *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 542-43 (10th Cir. 1987); *Players, Inc. v. City of New York*, 371 F.Supp.2d 522, 540-43 (S.D.N.Y. 2005).

Petitioners have provided no legal support for their contention that smoking should be recognized as one of the limited situations invoking a constitutional right to privacy. *See Roe v. Wade*, 410 U.S. 113 (1973) *rehearing denied* on February 26, 1973 (recognizing a privacy right regarding making a decision to terminate a pregnancy), *Loving v. Virginia*, 388 U.S. 1, 12

(1967) (recognizing a privacy right regarding marriage), *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (recognizing a privacy right in child rearing and education.) Only personal rights that are determined to be "fundamental" or "implicit in the concept of ordered liberty" are protected under the penumbra of constitutional privacy rights. *Palko v. Connecticut*, 302 U.S. 319 (1937).

Contrary to Petitioners' assertions, smoking in a public place is not a fundamental right that would give rise to a constitutional privacy interest. *City of North Miami v. Kurtz,* 653 So.2d 1025, 1028 (Fla. 1995) (finding that the penumbra of fundamental privacy rights does not include the "right to smoke"), *Operation Badlaw, Inc. v. Licking General Health District Board of Health, et al.,* 866 F.Supp. 1059, 1064 (S.D. Ohio 1992). The fact that the ability to smoke or to permit smoking is not constitutionally protected is exemplified by the heavy regulation of tobacco products. These regulations reflect the collective conscience of the citizens of the United States that there is no fundamental right to smoke or to permit smoking at any place and any time.

For all of the reasons discussed above, the Eighth Circuit's decision upholding the Ordinance was entirely consistent with the decisions of all other courts that have addressed similar claims, and thus, this Court should deny the petition for writ of certiorari.

2. THE EIGHTH CIRCUIT'S DECISION CORRECTLY UPHELD BELTRAMI COUNTY'S ORDINANCE AS A REASONABLE PROTECTION OF PUBLIC HEALTH AND SAFETY.

Petitioners claim that the County's Ordinance is unreasonable because there is no conclusive proof that second-hand smoke is dangerous, exposure to smoke is voluntary for customers and employees, and the regulation of smoking is not a valid public purpose. Such arguments are without merit and do not warrant this Court's review. As determined by the District Court and Eighth Circuit, the Ordinance represents a valid exercise of County authority.

The Beltrami County Board has the authority to act in furtherance of the public health and welfare. In enacting the Ordinance at issue here, the County clearly expressed a public interest in prohibiting smoking in public places. In the preamble to its Ordinance, Beltrami County asserted an important interest in safeguarding the health of its citizens and patrons of establishments located in the County from the ill and serious effects of second hand smoke. Despite Petitioners' opinions to the contrary, these risks are well-documented and commonly recognized. *See Beatie v. City of New York*, 123 F.3d 707, 709-10 (2nd Cir. 1997) (chronicling the dangers of second hand smoke). The public interest in avoiding the significant health threats posed by involuntary second hand smoke is substantial and indisputable.

Petitioners ignore the great weight of scientific evidence that second hand smoke is dangerous, and instead, rely exclusively on the Enstrom/Kabat Report for their position that the health effects of second-hand smoke are merely public conjecture. However, the County has the authority to weigh the credibility of competing information in determining the merits of legislating in the public interest. *See N.W. Enterprises, Inc. v. City of Houston*, 27 F.Supp.2d 754 (S.D. Tex. 1998) *reversed in part on other grounds*. The judiciary is "not a super-legislature wherein judges sit to 'apprise the wisdom' of a municipality's discretion." *Threesome Entertainment v. Strittmather*, 4 F.Supp.2d 710, 719 (N.D. Ohio 1998) (citations omitted). A municipality's choice of whether it should rely upon one report over another is fully within its legislative discretion and courts need only conclude that a reasonable legislature would have enacted the challenged ordinance. *Id.* (citations omitted).

Furthermore, people who choose to smoke may still do so in their private residences, motor vehicles or in certain outdoor spaces. They are only prohibited from smoking in public places where their personal habit infringes and affects the general health and welfare of other citizens. The same public interest in prohibiting smoking in public places has been duly recognized and declared by the Minnesota legislature through the Minnesota Clean Indoor Air Act and the recent enactment of the Freedom to Breathe Act of 2007. Minn. Stat. §§ 144.411-17. The County clearly has a significant interest in the health and safety of

its residents. In order to promote those interests, the County must be able to promulgate reasonable regulations such as the Ordinance at issue here.

The District Court and Eighth Circuit appropriately upheld the Ordinance as a valid exercise of the County's authority. Petitioners have provided no reason to overturn those decisions, and thus, this Court should deny the Petition.

3. THE DISMISSAL OF THE CLAIMS OF PETITIONERS SOLBERG AND NESS WAS AFFIRMED BY THE EIGHTH CIRCUIT ON THE MERITS.

Petitioners Solberg and Ness claim that the District Court erred in dismissing their claims for failure to prosecute. The District Court granted summary judgment against Petitioners Solberg and Ness for failing to appear at hearing to oppose summary judgment. Because the Eighth Circuit affirmed the dismissal of the Petitioners' claims on the merits, it did not reach this issue. Accordingly, the claims of Petitioners Solberg and Ness regarding the dismissal of their claims for failure to prosecute need not be reviewed by this Court.

By not appearing at the summary judgment hearing, Petitioners Solberg and Ness failed to prosecute their claims. They are entitled to no special considerations because they appeared pro se. *See Jourdan v. Jabe*, 951 F.2d 109 (6th Cir. 1991) (prisoner suing pro se was not entitled to any special consideration in

determining whether to dismiss his complaint for failure to prosecute). Despite the District Court's dismissal of the claims of Petitioners Solberg and Ness for failure to prosecute, the Eighth Circuit addressed (and affirmed the dismissal of) their claims on the merits. As a result, it would be improper for this Court to review the claims raised by Petitioners Solberg and Ness regarding failure to prosecute.

4. PETITIONERS' CLAIMS HAVE BEEN RENDERED MOOT BY THE ENACTMENT OF THE MINNESOTA FREEDOM TO BREATHE ACT OF 2007.

During its 2007 Regular Session, the Minnesota legislature adopted the Freedom to Breathe Act of 2007, which amended the Minnesota Clean Indoor Air Act by eliminating smoking in all public places, places of employment, public transportation, and at public meetings. Minn. Stat. § 144.411-17. The amendments took effect on October 1, 2007. The Freedom to Breathe Act of 2007 imposes statewide restrictions on smoking similar to those imposed by the Beltrami County Ordinance. Even if Petitioners could prevail on their alleged claims against the County, Minnesota law would still prohibit smoking in public places. As a result, the Petition should be denied as moot.

The Freedom to Breathe Act prohibits smoking in all public places, which are defined as "any enclosed, indoor area used by the general public, including, but

not limited to, restaurants; bars; any other food or liquor establishment; retail stores and other commercial establishments; educational facilities other than public schools . . . ; hospitals; nursing homes; auditoriums; arenas; meeting rooms; and common areas of rental apartment buildings." Minn. Stat. § 144.412, subd. 2. "Places of employment" are defined by the Act as "any indoor area at which two or more individuals perform any type of a service for consideration of payment under any type of contractual relationship" or where two or more individuals gratuitously perform services for which individuals are ordinarily paid. *Id.*, subd. 1b. The Act clearly imposes the same smoking prohibition on the same types of places as the Beltrami County Ordinance, including the businesses owned by Petitioners.

Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Following the enactment of the state-wide smoking ban, there is no actual controversy between the Petitioners and Respondents. Even if Petitioners were to prevail on their alleged claims, the Court would be unable to effectively order the requested relief because the Minnesota Freedom to Breathe Act of 2007 prohibits Petitioners from smoking, or allowing smoking, in public places and places of employment.

Despite Petitioners erroneous conclusory assertion that this matter is not rendered moot by the Minnesota Freedom to Breathe Act of 2007, there is

no reason for this Court to waste limited judicial resources on a case challenging a county ordinance where the state has acted to impose the same regulation. As stated above, Petitioners have failed to demonstrate any legal support for a reversal of the Eighth Circuit's decision. However, even if they had, the Petition should be denied because this matter has been rendered moot by the enactment of the Minnesota Freedom to Breathe Act of 2007.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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